INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
THE REPORTS AND FINDINGS OF THE COMMISSION	8
ARGUMENT	16
I. In recognizing the use of motor vehicles in substitution for way-freight rail service on less-than-carload freight as a special type of service, and in so treating and restricting the motor carrier operations of Seaboard in the instant case, the Commission acted within its statutory powers	16
II. In passing upon the issue of public convenience and necessity in Seaboard's applications the Commission did not apply improper criteria nor fail to apply necessary criteria	22
III. The failure of the Commission to require Seaboard to comply with sections 217 and 220 of the Interstate Commerce Act does not invalidate the orders in issue	27
IV. Appellants were accorded a full and fair hearing	30
(a) The Commission action in excluding certain evidence or its refusal to require Seaboard to produce certain evidence was not error	30
(b) The composition of the joint boards which heard the several applications did not contravene section 205 (a)	32
CONCLUSION	33
APPENDIX	34

636638—45——1

TABLE OF CASES

Campbell Sixty-six Express, Inc. v. *Frisco Transp. Co.*, 43 M. C. C. 641 24
Chicago, St. P., M. & O. R. Co. v. *United States*, 322 U. S. 1 31
Coordination of Motor Transportation, 182 I. C. C. 263 18
Crichton v. *United States*, 56 F. Supp. 876, Aff.—U. S.—, 65 Sup. Ct. Rep. 114 32
Ex Parte 129, 232 I. C. C. 683 28
Hartley v. *Commissioner*, 295 U. S. 216 22
Kansas City Southern Transport Co., Inc., Common Carrier Application, 10 M. C. C. 221 ..... 22, 23, 26
Kansas City Southern Transport Co., Inc., Common Carrier Application, 28 M. C. C. 5 ..... 6, 26
Missouri Pacific R. Co., Extension, 41 M. C. C. 241 23
Motor Bus and Motor Truck Operation, 140 I. C. C. 685 18
North Coast Transportation Co. v. United States, 54 F Supp. 448, Aff.—U. S.—, 65 Sup. Ct. Rep. 62 32
Patterson v. *Louisville & Nashville R. Co.*, 269 U. S. 1 22
Pennsylvania Truck Lines, Control-Barker, 5 M. C. C. 9 23
Pennsylvania Truck Lines, Extension, 42 M. C. C. 759 26
Thomson v. *United States*, 321 U. S. 19 ..... 5, 24
United States v. *Chicago Heights Trucking Co.*, 310 U. S. 344 13
United States v. *Louisville & Nashville R. Co.*, 236 U. S. 318 22
United States v. *Pennsylvania R. Co.*, 242 U. S. 208 22
Willett Co. of Ind., Extension, 21 M. C. C. 405 26

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 558

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 206) is reported in 56 F. Supp. 394. The reports of the Interstate Commerce Commission (R. 81, 109, 15 are published in 17 M. C. C. 413, 28 M. C. C. 5, and 34 M. C. C. 441, respectively.

JURISDICTION

The final order of the District Court was entered July 21, 1944 (R. 221). The petition for appeal was filed August 18, 1944 (R. 223), and was allowed the same day (R. 223). Jurisdiction of this Court is invoked under the Urgent Defici-

encies Act of October 22, 1913, 38 Stat. 208, 219–221 (28 U. S. C. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C. 345). Probable jurisdiction was noted November 20, 1944 (R. 1235).

QUESTIONS PRESENTED

The ultimate question here in issue is the validity of certain orders of the Interstate Commerce Commission granting applications made under sections 206 and 207 of Part II of the Interstate Commerce Act for a certificate of public convenience and necessity, subject to prescribed conditions, for operation by the Receivers of the Seaboard Air Line Railway Company[1] as a common carrier by motor vehicle over fourteen different routes generally paralleling its lines of railroad in the States of Virginia, North Carolina, South Carolina, and Florida. The Commission found that the operations proposed, restricted to those which are auxiliary to or supplemental of the rail service of the Seaboard, were required by public convenience and necessity.

Subordinate issues are:

1. Whether the Commission was lawfully empowered to recognize the type of operations authorized as constituting a special type of motor carrier operations.

[1] Hereinafter referred to as "Seaboard".

2. Whether the Commission's ultimate finding that public convenience and necessity required the granting of the applications was based upon proper statutory criteria.

3. Whether such ultimate finding was supported by requisite factual findings.

4. Whether appellants were accorded a full and fair hearing.

5. Whether the Commission in conducting the hearings complied with the procedural requirements of the Interstate Commerce Act.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 34.

STATEMENT

This case had its origin in eight applications filed on February 23, 1937, by Seaboard under the provisions of sections 206 and 207 of the Interstate Commerce Act (R. 32). Each of these applications sought authority to institute trucking operations over regular routes and between designated termini. These applications were docketed as MC–88687 and Sub-Nos. 1 to 7, inclusive. Subsequently during the period up to February 21, 1941, Seaboard filed 21 additional applications for authority to institute additional trucking operations between specified points upon its lines of railroad. These were docketed as Sub-Nos. 8 to 28, inclusive (R. 32, 169). Six of these

applications were dismissed by the Commission before hearing, namely, Sub-Nos. 11, 12, 13, 14, 16, 17 (R. 169). All of the applications thus filed except for the six mentioned were granted but the present proceeding concerns the validity of the Commission's action in only 14 of these, namely, MC–88687, Sub-Nos. 1 to 10, inclusive, and 15, 18, and 19 (R. 5).

Following the filing of the applications involved in this suit the Commission assigned them for hearing before several joint boards designated in accordance with the operations proposed to be conducted as shown by each application.[2] At these hearings a number of motor carriers and the Southern Motor Carriers Rate Conference appeared as protestants. The latter filed motions challenging the composition of the several joint boards on the ground that the operations proposed should be considered as a single operation covering three states, or, considered in connection with Seaboard's rail operations, as involving six states. This objection was later made the subject of formal petitions to the Commission asking that all the applications be consolidated, heard as one, before a properly constituted joint board (R. 47). The motions and petitions were denied (R. 36, 37, 52). Hearings were had upon the separate applications and recommended reports and orders were issued. Exceptions to the proposed reports in the first 8 applications were filed and argument

[2] See section 205, Appendix, p. 37.

was had before Division 5. Later argument was also had in Sub-No. 18. On July 11, 1941, Division 5 issued its report embracing the title proceeding, Sub-Nos. 1 to 10, inclusive, 15 and 18, stating as its reason for consolidating the proceedings in a single report that "since applicants are the same in all the proceedings and the issues are similar, the case will be disposed of in one report" (R. 83).

In granting the several applications the Division predicated its action upon a finding that the proposed operations were of a specialized type; that is, a substitution of trucks for local way-freight trains in the handling of less-than-carload rail traffic, and restricted the authority accordingly.[3]

Thereafter Seaboard filed a petition for rehearing and reconsideration asking for the elimination condition 3 of the certificates which restricted the trucking operation to shipments moving under a through bill of lading and involving a prior or subsequent rail movement. Having received similar petitions in other proceedings involving like truck-for-rail operations, the Commission reopened the instant proceedings, and, in conjunction with four other pending proceedings heard oral argument on the issue of the removal

[3] The trucking operations are precisely like those described by this Court in *Thomson* v. *United States*, 321 U. S. 19, and in issue in No. 507, October Term, 1944, *Interstate Commerce Commission* v. *Parker*.

of this restriction. This was followed by the Commission's report and order of January 24, 1941, in which it disposed of Seaboard's petition (R. 109), *Kansas City Southern Transport Co. Common Carrier Application,* 28 M. C. C. 5. In this report the Commission reaffirmed its prior findings but substituted the key-point restriction for the prior or subsequent rail-haul condition.[4] At the same time the Commission recognized that the key points so fixed might change from time to time and therefore invited applicants to file appropriate petitions to amend the prescribed key-point locations (R. 118). Responding, the Seaboard filed a petition for rehearing as a result of which the Commission by order of July 25, 1941, reopened the proceedings for the limited purpose of determining whether the key points prescribed by the report and order of January 24, 1941, should be modified (R. 136).

Thereafter the Antitrust Division of the Department of Justice and the American Trucking Association asked leave and were permitted to intervene. Further hearing was held on November 12 and 13, 1941, limited to a consideration of appropriate key points. At this hearing both these intervenors attempted by appropriate motions to have the Seaboard's applications reheard *de novo.* These motions were denied. By formal petitions filed December 5, 1941, the same inter-

[4] See Brief for Interstate Commerce Commission in No. 507, October Term, 1944, pp. 27–29.

venors asked the Commission to reopen, consolidate, and rehear all the applications (R. 136, 137). These petitions were denied on January 21, 1942.

On July 6, 1942, the Commission issued its report on further hearing (34 M. C. C. 441, R. 151) in which it rejected the contentions of the intervenors and modified the key-point designations theretofore prescribed.

On October 26, 1943, the suit out of which this appeal grows was filed in the United States District Court for the Eastern District of Virginia. The complaint asked that the orders of July 11, 1939 (17 M. C. C. 413, R. 81), January 24, 1941 (28 M. C. C. 5, R. 109), July 6, 1942 (34 M. C. C. 441, R. 151), and the certificate of November 30, 1942 (R. 161), be annulled and set aside, and that the Commission be directed to reopen the proceedings (R. 22). The United States as statutory defendant confessed error and asked that the relief prayed for be granted (R. 172).

The cause was heard and submitted on June 1, 1944, upon the record of the proceedings before the Commission, the evidence adduced by Seaboard in support of its claim of laches, and the briefs and arguments of counsel. On July 17, 1944, the court below filed its opinion, Judge Paul dissenting, sustaining the validity of the Commission's orders in the premises (R. 205). On July 21, 1944, final judgment was entered dismissing the complaint (R. 22).

The present appeal was timely taken.

THE REPORTS AND FINDINGS OF THE COMMISSION

The reports of the Commission of July 11, 1939 (17 M. C. C. 413, R. 81), January 24, 1941 (28 M. C. C. 5, R. 109), and July 6, 1942 (34 M. C. C. 441, R. 151) contain the findings and conclusions by which the validity of the Commission's action must be tested.

In the first report the Commission dealt preliminarily with the contention that the applications should have been heard together before an appropriate joint board or an examiner—a contention that is pressed in this appeal. The Commission found that the joint board procedure prescribed by the statute was to be governed by the operations proposed to be conducted as shown by the application filed (R. 85, 86). As to the factual aspect of the several applications being in substance a single application the Commission said (R. 86):

> "However, we now have the entire situation presented by the several applications before us in all its aspects, following full and complete hearings, and we perceive no reason why we cannot properly consider and dispose of the applications on their merits upon the records made. Our attention has been directed to no instance wherein the adverse ruling of the joint board respecting evidence relating to operations over other than the route before the board has been prejudicial to protestants."

The report stated the purpose of the proposed operations as being "to substitute truck service for the existing less-than-carload freight service of the Railway between stations on its lines" (R. 87). It then discussed seriatim the particulars of the proposed operations under the several applications, the advantages claimed for each substituted service, and noted the existing motor carriers which were operating along the several routes in question (R. 88–101). The report then proceeded to a general discussion and findings. The Commission found:

1. In most instances there is adequate motor carrier service over the considered routes (R. 104).

2. The proposed service will expedite deliveries of less-than-carload shipments which now move by rail (R. 104).

3. The proposed service should result in improved service with respect to merchandise, as well as carload traffic (R. 104).

4. Applicants will be able to effect some economies through the elimination of train stops and reduction of the number of cars in their trains (R. 104).

5. The proposed rail-truck coordinated service is in the public interest (R. 105).

6. There will not be any great diversion of traffic from existing independent motor carriers (R. 105).

7. The only need shown is for service which is strictly supplemental of, or auxiliary to, and coordinated with applicants' rail service (R. 105).

The Commission then proceeded to make its ultimate finding in the language of the statute as follows:

> "We find that the present and future public convenience and necessity require operation by applicants as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities between the points and over the regular routes described in the appendix hereto, serving the intermediate and off-route points referred to, and subject to the following conditions (R. 105):
>
> "(1) The service by motor vehicle to be performed by applicants shall be limited to service which is auxiliary to or supplemental of the service of the Seaboard Air Line Railway;
>
> "(2) Applicant shall not serve any point not a station on the rail lines of the Seaboard Air Line Railway;
>
> "(3) Shipments transported by applicants by motor vehicle shall be limited to those which move under a through bill of lading covering, in addition to movement by motor vehicle, a prior or subsequent movement by rail.
>
> "(4) Such further specific conditions as we in the future may find it necessary to impose in order to restrict applicants' operations by motor vehicle to service which is

auxiliary to or supplemental to the rail service of the Seaboard Air Line Railway.

"We further find that applicants are fit, willing, and able properly to perform the service proposed by the considered applications and to conform to the provisions of the act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted."

In its report of January 24, 1941 (28 M. C. C. 5, R. 109), Chairman Eastman, speaking for the Commission, reconsidered the imposition of condition 3 in the instant applications and in other applications involving the inauguration of the substituted truck-for-rail service. Speaking of the characteristics of this specialized type of motor carrier operations the report made these general findings:

(1) Coordinated service through the voluntary cooperation of all or some of the existing motor carriers would not be practicable and the useful public purpose which the coordinated operations would serve could not be achieved effectively through the use of existing facilities (R. 114).

(2) The development of the coordinated service would not seriously endanger the operations of existing motor carriers (R. 114).

(3) The traffic under consideration, which is chiefly so-called, package or merchandise freight in less-than-carload quan-

tities, is, of course, traffic which the railroads are and have been under an obligation to transport and which they will continue to transport whether we grant or deny the applications (R. 114).

(4) The way-freight train service which is used in serving the smaller stations is uneconomical and inefficient, and trucks can be used in substitution therefor to much advantage both to the railroads and to the public served (R. 115).

(5) Reduction in cost and increased efficiency of transportation service inure to the benefit of the general public and are required by public convenience and necessity (R. 115).

The report then considered the rail-haul condition theretofore imposed upon grants of authority to conduct the substituted service. It found that the railroad, as well as independent motor carriers, has been and is furnishing service between the stations, but that between many of them the present means of railroad service, the way-freight train, is uneconomical and inefficient, and as to that traffic public convenience and necessity require the increased economy and efficiency which will result from such substituted use of trucks (R. 116). It, therefore, adopted the key-point plan of condition in lieu of the rail-haul condition.

Recognizing that unnecessary and wasteful duplications of service should be avoided in the public interest the report examined carefully the

proposal that existing carriers could be utilized with equal effect without adding new operations to the sum total of existing facilities. It reached the conclusion that none of the three alternative plans was feasible, namely, (1) expansion of existing Railway Express service to handle this traffic; (2) use of existing motor carriers by the establishment of proportional rates covering the motor carrier portion of the transportation; (3) the establishment of through routes and joint rates with existing motor carriers (R. 123, 124). The first plan was dismissed because it was not shown that the Express Agency would be willing to furnish such service or could do so without loss, or that the existing service of this kind which it furnishes by passenger trains at freight rates is profitable either to it or to the railroads (R. 123). The second plan was held to be unlawful under the decision of this Court in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 (R. 124). As to the joint rate plan the Commission after pointing out that the railroad has been engaged for many years in handling the less-than-carload traffic in question wholly with its own facilities, that the railroad would divide control and responsibility with one or more motor carriers and the latter would deal directly with shippers at one end of the joint haul, that the motor carrier or carriers upon which it would depend in part for the performance of an efficient joint service would also be engaged, solely or

jointly with motor carrier connections, in a competitive all-motor service, and that the joint service would entail additional billing, checking, and transfer service (R. 126), made the following finding (R. 129):

> "Having in mind that, for the reasons above indicated, only the joint-rate plan is available, that under that plan applicant would find it necessary to divide control over and responsibility for less-than-carload service in the affected area with motor-carriers which would continue to afford a competing all-motor service, and that the unit costs of the motor service would be materially higher than under applicant's plan with no assurance of offsetting savings in truck-miles, we find that the useful public purpose which would be served by coordination of rail and truck service could not be served as well by existing motor carriers as under applicant's proposed plan."

Finally the report held that the proposed new operation will not endanger or impair the operations of existing carriers contrary to the public interest (R. 129).

The last report of the Commission dated July 6, 1942 (34 M. C. C. 441, R. 151), which is involved in this case dealt principally with the application of the key-point condition in the certificates theretofore granted to Seaboard. It resulted from petition for modification of the key points prescribed in the report and order of

January 24, 1941 (R. 109) and hearing thereon which by Commission order of July 25, 1941 (R. 135), was restricted to the determination "whether Condition 3 as set forth in the prior report, 28 M. C. C. 5, should be modified, and, if so, the extent of such modification" (R. 136).

In this report the Commission stated (R. 156):

> "The original rail-haul condition which restricted the authorized operations to coordinated movements partly by railroad and partly by motor vehicle was too broad in that it permitted the applicants to handle by motor vehicle over long distances and between large and important points shipments which should properly move a greater portion of the distance, or wholly, in the superior through train service. On the other hand, it was too restrictive, because in many instances it required applicants to continue between small points the slow and costly way-freight train service which the substituted service was intended to avoid. It was to remedy these defects that we substituted a key-point condition. We pointed out, however, that in view of the limited record difficulties had been encountered in determining the key points in all instances, and that any need for modification of the designated key points should be called to our attention by appropriate petition."

The report then discussed the evidence with respect to the appropriate key points and modi-

fied Condition 3 by designating key points as follows (R. 159):

> "No shipment shall be transported by applicants as a common carrier by motor vehicle from Richmond to Petersburg, Va., not including shipments moving from Richmond through Petersburg to points between Petersburg and Henderson, N. C., from Monroe to Charlotte, N. C., or from Charlotte to Monroe not including shipments moving from or to Rutherfordton, N. C., or points between Charlotte and Rutherfordton, nor between the following points or to or through or from more than one of said points: Richmond, Va., Henderson, Raleigh, Hamlet, Monroe, and Wilmington, N. C.; Hartsville, Columbia, Garnett, and Greenwood, S. C.; and Jacksonville, Tallahassee, and Tampa, Fla."

ARGUMENT

I

In recognizing the use of motor vehicles in substitution for way-freight rail service on less-than-carload freight as a special type of service, and in so treating and restricting the motor carrier operations of Seaboard in the instant case, the Commission acted within its statutory powers

The whole structure of appellants' argument is built upon the initial premise that the Commission is without statutory power to recognize and authorize these specialized operations of motor vehicles in conjunction with the less-than-carload

rail service, which they designate as "hybrid." Thus on p. 69 of appellants' Brief the statement is made that there is no authority in law for the finding that the motor carrier operations authorized are a "new type of service."

Upon this postulate hangs the entire argument of appellants: whether the Commission has adopted a practice which runs counter to the Congressional policy as expressed in the Interstate Commerce Act; whether in passing upon the instant applications the Commission employed improper criteria in finding public convenience and necessity; whether the Commission can lawfully exempt these operations from the tariff and accounting provisions of the Act; whether the Commission improperly excluded evidence; and whether the Commission failed to make the subordinate findings necessary to support its ultimate finding that public convenience and necessity required the institution of the proposed service.

That the Commission in recognizing and treating motor carrier operations as of a special type when they constitute one component of a single rail-truck transportation service, was acting well within its statutory power, is demonstrated through a consideration of the background of the Motor Carrier Act, its legislative history, its legislative policy, and the language of the enactment itself.

In the Commission's Brief filed in No. 507, *Interstate Commerce Commission* v. *Parker*, the

background and legislative history of the Motor Carrier Act is set out with some particularity. Without burdening this brief with a repetition of the matters there set forth, we deem it sufficient for present purpose to summarize what was there said.

The use of motor vehicles by railroads in the handling of merchandise shipments in way-freight service had come into being prior to 1932. The attention of Congress was specifically called to this use by the reports of the Commission in *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, and *Coordination of Motor Transportation,* 182 I. C. C. 263, 336. These two reports approved and emphasized the desirability of continuing this substitute truck-for-rail service. Commissioner Eastman in testifying before the House and Senate Committees in 1935, called attention to the growing use by railroads of motor vehicles not only in their terminal operations but also as a substitute for way-freight service, and expressed the view there would be found many more ways where they could be used to advantage in combination with railroad service, and hoped to see the time when railroads would use these opportunities fully. Hearings on H. R. 5262 and 6016, 74th Cong. 1st Sess., 1935, p. 46; Hearings on S. 1629, 74th Cong. 1st Sess., 1935, p. 85.

It cannot be said that the so-called "special type of motor carrier service," was an innovation subsequent to the Motor Carrier Act, created by the

Commission in arbitrary favoritism towards the railroads, as appellants' argument asserts. On the contrary it was not only an already existing special method of using motor vehicles, but a method which was known to Congress and recommended to it as a type of motor carrier operation that should be encouraged.

In this setting Congress enacted the policy of Motor Carrier Act of 1935, "to improve the relations between and coordinate transportation by and regulation of, motor carriers and other carriers." By section 213 (a) it specifically empowered "a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof" upon the Commission's finding "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Of significance also is the fact that section 207, dealing with the issuance of certificates of convenience and necessity, made no distinction between a railroad applicant and any other applicant and the final enactment made no change in the text of the recommended bill of Coordinator Eastman who stated that "the bill permits a railroad to own these other forms of transportation or acquire them with the approval of the Commission except competitive wa-

ter lines." Hearings on S. 1629, 74th Cong. 1st Sess. Part I, p. 85.

Finally the 1935 Act by section 204 (c) authorized the Commission to establish "such just and reasonable classifications of * * * groups of carriers included in the term 'common carrier by motor vehicle,' * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest." Here the Commission has recognized and in substance classified a motor carrier operation which is auxiliary to or supplemental of railroad service. It has safeguarded other motor carrier transportation operating in the same field by appropriate limitations to the special service described.

By the time the Transportation Act of 1940 was enacted the Commission had established its practice in dealing with the inauguration of this auxiliary and supplemental trucking service. It had announced the general proposition that the use of trucks as an adjunct to rail service was to be encouraged. By a series of reports it had declared the grounds upon which it deemed public convenience and necessity would require its approval, namely, the resulting economies, faster

and more frequent local service, improvement in the through rail service on carload shipments and the release of cars for such through movements. It had found that these motor carrier operations are of a special type, that they do not introduce new competitive factors within the field of operations, that the operations of the independent motor carriers will not be adversely affected, and finally that they can best be conducted under a management synchronized with the railroad's operation.[8]

If the Commission had been acting without statutory authority, or had been applying a practice in violation of the policy of Congress, it would seem that Congress would have been at pains to set the Commission right in the 1940 legislation. But the Transportation Act of 1940, while enacting a new transportation policy, still laid emphasis on the importance of coordinating and preserving all modes of transportation, and the promotion of "safe, adequate, economical and efficient service, * * * all to the end of developing, coordinating and preserving a national system of transportation * * *." The provisions of sections 204 (c) and 207 were left unchanged. Section 213 was eliminated but its provisions were incorporated in a new section 5, applicable to rail, motor and water carriers. In

[8] See Commission reports cited in Brief for Interstate Commerce Commission in No. 507, *Interstate Commerce Commission* v. *Parker*, pp. 19–33, and Appendix "B."

the extensive legislative history leading up to the 1940 Act there is no suggestion of criticism to the effect that the Commission was acting in arbitrary disregard of the will of Congress. Conversely the inference is inescapable that the Commission in dealing with this type of motor carrier operations was acting within its statutory powers and in accordance with Congressional policy. *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 229; *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318; *Patterson* v. *Louisville & Nashville R. Co.*, 269 U. S. 1, *Hartley* v. *Commissioner*, 295 U. S. 216.

II

In passing upon the issue of public convenience and necessity in Seaboard's applications the Commission did not apply improper criteria nor fail to apply necessary criteria

As has been detailed in the Commission's brief filed in No. 507, its treatment of applications for authority to inaugurate the restricted type of motor carrier operations which are here involved has followed a consistent pattern. This has been premised upon its finding that the service in question is of a type distinguishable from the ordinary over-the-road motor carrier service in that it is essentially a mere mechanical improvement in rail service. *Kansas City S. Transp. Co., Inc., Common Carrier Appl.*, 10 M. C. C. 221, 235.* The

* See also cases cited in footnote, p. 20, Commission's Brief in No. 507, *Interstate Commerce Commission* v. *Parker*.

railroad in employing motor trucks in lieu of local way-freight trains in handling less-than-carload traffic is merely transporting traffic which it has always transported and is and continues to be under an obligation to transport. That being so it inexorably follows that there is no creation of a new competitive factor within a field already served by both rail and motor carriers operating in their ordinary manner. *Kansas City S. Transp. Co., Inc., Common Carrier Appl., supra; Missouri Pacific R. Co., Extension,* 41 M. C. C. 241, 244; *Penna. Truck Lines, Inc., Control-Barker,* 5 M. C. C. 9, 11. Specifically in the instant case the Commission said (34 M. C. C. 441, 443, R. 155):

> "* * * Applicants, as a motor carrier, do not solicit traffic from the general public but merely utilize motor vehicles in fulfilling their undertaking to transport as a railway. The motor-vehicle service is auxiliary to or supplemental of applicants' rail service and is so limited by condition 1. The modifications requested [in prescribed key points] will in no way change the character of the service applicants are authorized to perform as a motor carrier; nor will they adversely affect the operations of existing motor carriers, nor restrain competition in the motor carrier field."

Having established this service as specialized and restricted motor carrier operations "offered by the railroad as component parts, not as sepa-

rate or distinct segments, of its single service,"[1] the Commission carefully took measures to insure that the operations so authorized would continue as such. Not only did it prescribe present conditions designed to prevent an expansion of these specialized operations beyond their peculiar limits, but retained the continuing right to enforce and apply further conditions in the future should they be necessary. That the latter was not a perfunctory gesture is evidenced by the Commission's action in *Campbell Sixty-six Express, Inc.,* v. *Frisco Transp. Co.,* 43 M. C. C. 641.

The underlying factors which the Commission has held sufficient to meet the statutory standard of public convenience and necessity, having in mind the inherent character of the operations proposed, have been more or less similar in each case. They have been, generally speaking, the economies which will result in the use of trucks in substitution for local way-freight trains, faster and more frequent service to the local shippers, improvement in the through rail service on carload shipments and the release of cars for such through movements.

Thus in the instant case the Commission found that the proposed service will expedite deliveries of less-than-carload shipments which now move by rail; that it will result in improved service with respect to merchandise, as well as carload traffic; that applicant will be able to effect some

[1] *Thomson* v. *United States,* 321 U. S. 19, 24.

economies through the elimination of train stops and reduction in number of cars in their trains (R. 104, 105).

These findings, we submit, supported as they are by substantial evidence, are sufficient to satisfy the statutory criterion of public convenience and necessity.*

In dealing with this type of motor carrier operations the Commission was confronted with the problem of reconciling certain desiderata. Abstractly considered, the substitution of trucking operations in the handling of local less-than-carload rail traffic was of great public advantage. On the other hand was the economic desirability of avoiding a duplication of transportation facilities. Generally speaking in all cases coming before it there was already adequate motor carrier service in the territory affected. The institution of the substituted truck for rail service through the use of the facilities of existing motor carriers was dependent upon voluntary cooperation between the railroad and the independent truckers. The Commission was without power to compel such a joint undertaking. Therefore the Commission's problem became one of balancing the public advantages to be gained by permitting the railroad to engage in the limited trucking operations against the disadvantages of depriving the public of the improved service. The relative ability of providing the better service as between

* See Commission's Brief, pp. 34–40, in No. 507.

the railroad on the one hand and the independent truckers on the other, only became a pertinent issue when there was willingness on the part of both independent truckers and the railroad to enter into the joint undertaking, or at least no expressed unwillingness on the part of the railroad. But even on such an issue the Commission had given consideration to these alternatives and had arrived at a considered conclusion that it was in the public interest that there be no divided responsibility but there should be a complete service under a synchronized management in coordination with the railroad's operation. *Kansas City S. Transp. Co., Common Carrier Appl.*, 10 M. C. C. 221, 28 M. C. C. 5; *Willett Co. of Ind., Extension*, 21 M. C. C. 405, 409; *Pennsylvania Truck Lines, Extension*, 42 M. C. C. 759, 773. It should be pointed out that this conclusion was not reached in derogation of any right of existing motor carriers to participate in the transportation, or because of an injury which might be inflicted upon them through permitting the railroads to inaugurate the service, since in all these cases the Commission found that the proposed motor carrier operations did not duplicate the service then being rendered by the independent truckers and that it would to no substantial degree divert traffic from them.

The fallacy of appellants' argument lies in the assumption that the service which the Com-

mission has authorized is a like service which the independent motor carriers are now conducting.

Therefore, they say that the underlying considerations which would support a like service must be followed here. But as has been pointed out in this brief, and by the Commission time and time again in its reports, it was dealing with a new and different type of motor carrier operations, and consequently the elements which would meet the statutory standard might of necessity differ.

III

The failure of the Commission to require Seaboard to comply with sections 217 and 220 of the Interstate Commerce Act does not invalidate the orders in issue

Section 217 [9] deals with filing and publication of motor carrier tariffs. Section 220 [10] deals with the maintenance of motor carriers' accounts. Appellant contend that the Commission's failure to require Seaboard to conform to the standards prescribed by the Commission for other motor carriers under the provisions of those sections, unfairly discriminates against the latter and thus voids the orders in issue.

The Commission is given broad powers under these provisions of the statute. The tariffs of motor carriers "shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regula-

[9] See Appendix, p. 39.
[10] See Appendix, p. 40.

tion shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations." As to motor carriers' accounts the Commission "may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, * * * including the accounts, records, and memoranda of the movement of traffic, as well as the receipts and expenditures of moneys; and it shall be unlawful for such carrier, * * * to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto."

In dealing with the special type of motor carrier operations here involved the Commission in *Ex Parte 129*, 232 I. C. C. 683, prescribed the method of tariff publication to be followed by railroads engaged in the truck-rail less-than-carload transportation service. The Seaboard has complied with method so prescribed (R. 190). So too with the method employed by the Seaboard in keeping its accounts of its auxiliary motor carrier operations. By special order Seaboard was relieved by the Commission of the necessity of segregating the revenues and expenses of their motor carrier operations (R. 191). The mere fact that the Commission has permitted different tariff and accounting practices for different types of motor

carrier operations does not *per se* condemn such action. On the contrary the latitude which the statute accords the Commission in dealing with these matters suggests the need for diversified treatment dependent upon the type of carrier involved.

Particularly pertinent are the remarks of Senator Wheeler in discussing section 204 (c) which empowers the Commission to classify carriers:

> "This paragraph is of great importance. It enables the Commission to classify carriers performing special and distinct types of service, such as hauling of milk, livestock, furniture, petroleum products, newspapers, and so forth, and to vary the regulatory requirements as to rates, records, reports, and other matters in accordance with the nature of the service and the public need. These provisions will promote flexible administration and enable the Commission to avoid imposing unnecessary burdens. It is to the interest of carriers, shippers, and the public that this paragraph be retained.
>
> "I think that it is an exceedingly important paragraph, because of the fact that the Commission may find, for instance, that persons who are engaged simply in hauling furniture need one kind of regulations or rules that may be prescribed. Another classification may be those that are engaged in

hauling oil and gasoline and a certain type of regulations may be necessary for them. This paragraph gives to the Commission the power to handle those matters" (79 Cong. Rec. 5652).

But in any event, the questions of whether the Commission has acted lawfully in *Ex Parte 129* or in relieving the Seaboard from the necessity of segregating its accounts, cannot be raised collaterally in this proceeding. Section 207 provides that a certificate *shall* issue upon a finding that the applicant is fit, willing, and able, and that the service is required by the public convenience and necessity. Questions dealing with sections 217 and 220 are not pertinent here.

IV

Appellants were accorded a full and fair hearing

(a) The Commission's action in excluding certain evidence or its refusal to require Seaboard to produce certain evidence was not error

Appellants charge that not only did the Commission refuse to require Seaboard to produce but it refused to permit independent motor carriers to develop evidence bearing on public convenience and necessity and destructive competitive practices. Thus, they claim, they were denied a full and fair hearing.

Once again we call attention to the erroneous theory which the appellants persistently have pursued before the Commission, in the court below, and in this Court. The contention here made

is predicated upon the assumptions that the several applications here involved constitute in fact and substance a single operation identical with the service performed by existing independent motor carriers. But the Commission acting within its administrative province has held against the appellants on these assumptions. It has decided that the operations proposed were local, confined to the handling of less-than-carload freight between local stations on the Seaboard; that such operations were not those of the independent motor carriers and were not competitive to such independent motor carrier operations. It restricted the operating authority conferred so as to prevent Seaboard's operation of its trucks in competition with the independent motor carriers. Thus were questions of unnecessary, unfair and destructive competition removed from the case.

Appellants in the court below enumerated thirteen subjects which it claimed the Commission refused to consider, or were excluded. In examining these subjects it is clear that where they were relevant in the light of the proper issues evidence was received or its nonproduction explained.

But appellants have also failed to show wherein they have been injured through the Commission's ruling upon the evidence. Mere general charges are insufficient. *Chicago, St. P., M. & O. R. Co.* v. *United States*, 322 U. S. 1.

(b) The composition of the joint boards which heard the several applications did not contravene section 205 (a)

Appellants contend that in referring the several applications to different joint boards consisting of a representative of the states through which each application showed that the operations were to be conducted, the Commission did not comply with the requirement of section 205.[11] Under appellant's theory the Commission should have consolidated these applications and made its reference as though there were but a single application for a through motor carrier service over all the routes covered by the individual applications. It was upon this theory that the Southern Motor Carriers Rate Conference rested its motion to consolidate which was denied by the Commission February 16, 1938. (R. 52).

We submit that neither the language of the section nor its practical application supports a construction which would require the Commission to go beyond the face of the application in determining the proper composition of the local board. This Court has recently had occasion to consider similar contentions. *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448, affirmed per curiam, — U. S. —, 65 Sup. Ct. Rep. 62; *Crichton* v. *United States,* 56 F. Supp. 876, affirmed per curiam, — U. S. —, 65 Sup. Ct. Rep. 114. These cases are decisive of the issue raised here.

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[11] See Appendix, p. 37.

CONCLUSION

For the reasons set forth above we submit that the judgment and decree of the court below should be affirmed.

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For Interstate Commerce Commission.

APPENDIX

The declaration of policy of the Motor Carrier Act of 1935, 49 Stat. 543, states:

> "SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

The National Transportation Policy, as set forth in the Transportation Act of 1940, is as follows (54 Stat. 899):

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to

the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carry out the above declaration of policy."

"SEC. 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(1) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership

of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in the case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an ap-

plicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"SEC. 205. (a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates: * * *. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appro-

priate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving such weight to such conclusions as in its judgment the evidence may justify."

"SEC. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *"

"SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed

service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

"SEC. 217. (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful."

"(d) No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates,

fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part."

"SEC. 220. (a) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor in such form and detail as may be prescribed by the Commission. * * *"

"(d) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of motor carriers, brokers, or lessors as may after a reasonable time be destroyed, and prescribing the length of time the same shall be preserved. * * *"

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1944.

American Trucking Associations, Inc., Flamingo Truck Lines, Inc., et al., Appellants, *vs.* The United States of America, Interstate Commerce Commission, Legh R. Powell and Henry W. Anderson, Receivers of The Seaboard Air Line Railway Company.	Appeal from the District Court of the United States for the Eastern District of Virginia.

[June 18, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal involves the applicability by the Interstate Commerce Commission of the legal criteria for the issuance of certificates of convenience and necessity for motor truck operation by a railroad which were discussed in the opinion in *Interstate Commerce Commission et al.* v. *Parker et al.*, 507-8, October Term 1944, decided today.

In these applications Legh R. Powell and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, sought certificates of convenience and necessity under Sections 206(a) and 207(a), Motor Carrier Act, 1935, 49 Stat. 551, as amended by the Transportation Act of 1940, Interstate Commerce Act, part II, 54 Stat. 923, for the operation of motor trucks as auxiliary to and supplemental of the railroad operation of Seaboard. These motor routes were sought to improve the delivery of less-than-carload freight to way stations of the railroad. Fourteen applications are involved.[1] The routes in issue paralleled the main line of the Seaboard for the greater portion of the distance between Richmond, Virginia, and Jacksonville, Florida. Other controverted routes served shorter railway lines in North Caro-

[1] The detailed scope of thirteen of the applications is set out in the appendices to the reports of the Commission, 17 M. C. C. at 433; 28 M. C. C. at 25, and that of Sub—No. 19—Tampa-Sebring, Florida, route, in 21 M. C. C. at 776.

lina, South Carolina and Florida. Still other similar motor routes are operated by the Seaboard under orders of the Commission which are not now in controversy. Well above a hundred way stations will be served by the proposed applications. Objections to the applications were made by existing motor carriers along the routes and by various trucking organizations.

The Commission set the applications for hearing before joint boards pursuant to its interpretation of Section 205(b), Motor Carrier Act of 1935, as amended, Section 20(c), Transportation Act of 1940. Diverse recommended reports and orders were issued by the joint boards. A number of the applications were consolidated for argument before the Commission; others were dealt with on the exceptions to the joint board reports or by individual hearing. As the Seaboard was the only applicant and the issues were similar, the applications were disposed of as a single proceeding. *Seaboard A. L. Ry. Co. M. Operation—Gaston-Garnett, S. C.*, 17 M. C. C. 413; 21 M. C. C. 773; 28 M. C. C. 5; 34 M. C. C. 441.

The Commission granted the applications upon a finding that the proposed motor operations were a specialized type coordinated with rail operations. See *Thomson* v. *United States*, 321 U. S. 19. The specially constituted District Court affirmed the order of the Commission against attack because the certificates were granted without regard to their effect on existing motor carriers—a ground considered today in *Interstate Commerce Commission* v. *Parker*, *supra*, and over the additional objections that the joint boards were improperly constituted, that material evidence on the effect of the proposed operations on the existing or over-the-road motor truck service was excluded by the joint boards and the Commission and that the Seaboard was exempted from the tariff provisions of Section 217 and the accounts and record provision of Section 220 and the regulations thereunder. The appellees asserted that laches barred the court proceedings to enjoin the order of the Commission. The same issues are here. Nothing more need be said as to the contentions which were discussed in the *Parker* case. The district court proceedings and this appeal are authorized by 28 U. S. C. § 41(28) and §§ 43-48 and § 345.[2]

[2] The United States answered in the District Court and confessed error on all points. The Interstate Commerce Commission and the Seaboard supported the challenged order. The Government is represented here only by the Commission.

Joint Boards. From the earliest hearing, objection was made to the composition of the joint boards. Section 205(a), so far as pertinent here, provides:

> "The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, . . . refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations: Applications for certificates, permits, or licenses; . . . The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted . . . ."

The applications were for short routes of varying lengths up to nearly two hundred miles. Many were contiguous. Some crossed state lines. Others were wholly within a state. The Commission referred each application to a joint board composed of one member from the state or states in which the route involved in the particular application was situated.

As the series of applications cover continuous motor routes for a large portion of the railroad, appellants contend that the Commission should have consolidated these applications, constituted a board and made its reference as though there were only a single application for motor carrier service which was to be fully integrated with the Seaboard system in the six states which the railroad traverses or at least Virginia, North Carolina, South Carolina and Florida, in which states are located all the routes for which applications are made. If this position is correct the joint boards should have had four or six members instead of the one or two members who actually composed them. We are of the opinion that the statute does not support appellant.

It will be noted that Section 205(a) requires that applications for certificates be referred to joint boards composed solely of members from the state within which the operations are proposed to be conducted. In these applications the proposal is to conduct operations in a single state or in some instances in two states. The only source of knowledge for the Commission as to proposed operations were the applications. It seems necessary for it, therefore, to rely on the representations in the applications in determining the scope and in designating the joint boards to hear them.

The Commission has so interpreted the act. See *Argo and Collier Truck Lines Common Carrier Application*, 27 M. C. C. 563, 566; *Atlantic Coast Line Railroad Company Extension of Operation*, 30 M. C. C. 490, 491-2. These applications did not disclose or propose any interchange or unification of the traffic among the respective routes. Any one of them, or all except one, might have been refused by the Commission. Consequently, the Commission properly referred each application to a board having a member solely from the state or states in which the application proposes to conduct operations.

But the appellant contends that the grant of appellee's applications allows a unified service in three states and that appellee may have intended this result when it filed the several applications. Assuming this to be true, it does not make the Commission's action in the designation of separate boards unlawful. It is impossible for the Commission to predict accurately such a result or determine the existence of such an intent at the time an application is filed—at which time the Commission must designate a board for hearings. In most instances the intent or purpose of the applicant would become apparent only when hearings were held on the applications. Thus the appellant's position would require reassignment of cases to differently constituted joint boards as the scope of the application was narrowed or expanded by the testimony and arguments of the parties or conclusion of the joint boards or the Commission in the course of the hearing. See *Seaboard Air Line Railway Company Motor Operations—Gaston-Garnett, S. C.*, 17 M. C. C. 413, 416-17. It may be that in the light of our ruling on the admissibility of certain evidence the Commission may wish to consolidate hearings on the applications, but that is a matter for administrative discretion.

Excluded Evidence. Appellants throughout the proceedings have sought to introduce evidence both before the joint boards and the Commission as to the economic effect on the existing motor carriers of the proposed railway operation of motor trucks and have persisted in their objections at each stage of the proceedings. The joint boards refused to permit evidence as to conditions on any route except that covered by the application under consideration. Protestants made repeated efforts before the Commission to secure consolidation of the joint board hearings but

were unsuccessful. After the grant of the certificates with the limitation of operations to a prior or subsequent movement by rail on July 11, 1939, 17 M. C. C. 413, and February 17, 1940, 21 M. C. C. 773, the proceedings were reopened to consider the modification of the rail movement requirement in prior orders.[3] Substitution of the key point requirement or its equivalent for rail movement was made on January 24, 1941, *Kansas City S. Transport Co., Inc., Com. Car Application*, 28 M. C. C. 5. On October 3, 1941, all applications were reopened solely for reexamination of Condition 3, the key point condition, as to whether it "should be modified and, if so, the extent of such modification." This hearing was on all applications and before an examiner of the Commission alone. At that hearing the protestants pressed for the introduction and admission of further evidence as set up in their petition to which reference is about to be made. 34 M. C. C. 441, 442. This petition sought permission to introduce evidence as to the economic effect on the independent trucking industry and a direction to the Seaboard to furnish statistics as to the traffic it proposed to handle by truck.[4] The petition was denied without a statement as to the Commission's reasons for the denial. 34 M. C. C. 441, 442. This we think was erroneous.

The bill of complaint sets up in sections VIII and XI numerous types or items of evidence which it alleges were excluded by the joint boards or the Examiner. Some of these items, such as "The refusal of the railroad to enter into arrangements with the independent motor carriers" or "Use of railroad facilities and em-

[3] Sub No. 19 was modified in 34 M. C. C. 441.

[4] Two paragraphs of the petition read as follows:

"(b) To direct the taking of evidence for the purpose of developing and determining whether the proposed and existing operations by applicant, considered together, and in connection with its transportation policy and the transportation policy of railroads, express companies, water carriers, and railroad associations with which it is associated, will unduly restrain competition; impair sound economic conditions in the independent trucking industry; result in unfair and destructive competitive practices; discriminate against shippers; or otherwise be inconsistent with the provisions of, or the transportation policy declared in, the Interstate Commerce Act, and with the Antitrust Laws."

"(f) To direct the Seaboard Air Line Railway to furnish such statistical information for the record as may be necessary to enable the Commission to determine the extent, quantity, kind and character of traffic which Seaboard Air Line Railway handles subject to restrictions against participation by independent motor carriers, and the quantity, kind and character of traffic which Seaboard Air Line proposes to handle by truck and upon which it relies for support of its application for a certificate of convenience and necessity."

ployees," hardly require proof. They are admitted by all parties. Other items have had considerable proof introduced and more may be deemed by the Commission cumulative or unnecessary. "Cost of operations" would be an example. There is considerable overlapping of some categories of proposed evidence. For instance one item is "The economic effect on existing motor carriers" and "Destructive competition flowing from subsidized truck operations." Therefore we do not determine that all the items of evidence as set out by appellants, either in their bill of complaint or the petition before the Commission, were improperly excluded.

We think that it is sufficient to say that the joint boards and the Commission should have admitted evidence of the flow of traffic by truck from points covered in one application to points covered by other applications and evidence of the effect of the motor traffic, developed or prospective on all Seaboard routes for which applications are pending or already granted, on the over-the-road motor carriers. Furthermore other competent and material evidence which the protestants may produce as to the economic effect on the non-rail motor carriers should be received. The applicant will of course be required to furnish needed statistical evidence which is reasonably available to it and will have opportunity to submit evidence upon its own part. This specification of admissible evidence shall not be deemed to restrict the discretion of the Commission or the joint boards in receiving other evidence deemed by them or either of them material to aid in the solution of the issues between the parties.

While as pointed out by the brief of the Seaboard none of this evidence goes "to the inherent nature of auxiliary motor service performed by rail carriers," it may be decisive in the Commission's determination of whether to grant the applications. We have just said in the *Parker* case that the Commission must weigh the advantages of improved rail traffic against the injury to the over-the-road motor carriers to determine where public convenience and necessity lies. It is a difficult task to appraise these conflicting interests. It is a problem which should be solved only after the receipt by the Commission under its usual rules of admissibility, of all available material evidence as to the probable effect of the proposals on the operations both of the proponents of and the protestants against the applications. *Int. Com. Comm.* v.

Louis. & Nash. R. R., 227 U. S. 88, 91; *Chicago Junction Case*, 264 U. S. 258, 264-65. It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operation. The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information.

Appellants have other objections to the order of the Commission which have been considered and a few words need to be said about only two of them. It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of Section 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of Section 220 of the same part to which the other motor carriers are subject.[5] These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.

Appellees on their part suggest that the Commission's grant of the requested certificates should be sustained because of laches. The final certificate was issued on November 30, 1942, and this suit was brought October 21, 1943, eleven months later. The appellees' evidence as to change of position in reliance upon the certificate is not impressive. There was no specific proof of the purchase of equipment in reliance on the certificate or of failure to purchase other equipment, such as railroad cars, in reliance on the use of trucks. There was some testimony of minor adjustments in methods of operation. A number of the routes had not been put in operation and others were abandoned. The question of laches was not passed on by the district court.

In view of this evidence, we do not feel the defense of laches should be sustained.

As some trucks are being operated under certificates which were issued on these applications, because of the present war emergency we direct that the mandate herein be stayed until Au-

[5] A method of objection to improper practices, such as unreasonable tariffs or irregular accounting, by motor carriers under Interstate Commerce Act, part II, is provided by Section 204(c), as amended.

gust 1, 1945, to allow opportunity for such steps as the respective parties may deem advisable. See *Yonkers* v. *United States*, 320 U. S. 685, 321 U. S. 745; *Public Service Commission* v. *United States*, 323 U. S. 675.

Reversed.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE concur for the reasons stated in the dissenting opinion in Nos. 507-8, *Interstate Commerce Commission* v. *Parker*, decided today.